

with a female friend. There was some inference by claimant that this indicated Ms. Harris was involved in a lesbian relationship.

Shortly before the accident, claimant and Ms. Harris also got into a discussion about whose responsibility it was to dry the last rack of silverware. Claimant indicated she had dried two racks and the third one was Ms. Harris's responsibility. In claimant's words, Ms. Harris "got stormy and mouthed off." Claimant then went into a break room and, a couple of minutes later, Ms. Harris walked through the swinging doors and said "Lick my crotch." Claimant then responded "Oh, that's not my job. Rachel's?", inferring that was in some way related to Ms. Harris's alleged lesbian relationship. This comment immediately angered Ms. Harris, who then shoved claimant. Claimant fell back against a sink and landed on a chair, suffering an injury to her low back.

The dispute in this instance centers around whether the push by Ms. Harris, which led to claimant's injury, stemmed from the conversation between claimant and Ms. Harris regarding the silverware or whether it stemmed from claimant's comments regarding Ms. Harris's alleged lesbian relationship. One would clearly be within the scope of the party's employment and, therefore, compensable, while the other would be a personal dispute between claimant and Ms. Harris.

An employee's injuries are compensable, although the assault is the result of a personal matter not associated with employment, if the employer had reason to anticipate the assault and continued to allow the employees to work together. Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

There is no allegation in this instance that claimant and Ms. Harris had prior difficulties. They both agreed they had been working together for at least three years without prior animosity. Claimant testified the push by Ms. Harris came as a sudden and unexpected assault and she never expected that from Ms. Harris. Therefore, the Board does not find respondent had any reason to anticipate the assault in this instance.

Altercations between workers resulting in injuries usually do not arise out of employment and generally will not be compensable. Addington v. Hall, 160 Kan. 268, 160 P.2d 649 (1945).

However, an injury sustained by an employee during an assault arises out of the employment when it arises out of the nature, conditions, obligations and incidents of employment in the same manner as any other injury. Springston v. IML Freight, Inc., 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985). It is generally accepted that "if the assault grew out of an argument over the performance of the work, . . . the assault is compensable." 1 Larson's Workers' Compensation Law, § 11.12. A battery suffered at the hands of a fellow employee regarding a work-related

disagreement is compensable. Brannum v. Spring Lakes Country Club, Inc., 203 Kan. 658, 455 P.2d 546 (1969).

The time frame between the silverware incident and the shove is unclear in the record. Apparently, claimant had made more than one comment to Ms. Harris during the day about the supposed lesbian relationship. Those comments were irritating Ms. Harris, although not to the point of her becoming physically confrontational. Both claimant and Ms. Harris agreed they had worked a long shift and were short-handed on that day. This necessitated they carry a heavier-than-normal workload and work longer hours than anticipated. It also required that they perform additional labors, specifically the drying of extra silverware.

Claimant testified when she talked to Ms. Harris about the additional rack of silverware that Ms. Harris became mouthy and stormed out. It was apparently only moments later that Ms. Harris made the comment to claimant which led to claimant's response regarding the alleged lesbian relationship with "Rachel."

In order to decide this matter, the Board must attempt to separate the ongoing conversations between claimant and Ms. Harris involving both the lesbian relationship and the silverware. Based upon this record, that is impossible to do. The conversations appear to be one continuous, flowing conversation, with subjects changing rapidly. Whether Ms. Harris was irritated about the silverware incident is unclear, although she denies that the silverware comments led to her shoving claimant.

The Board sees this as a situation involving a build-up of tension over a period of time, culminating in the shove. It would appear as though both the working relationship and the personal comments were involved in the final physical assault. Therefore, the assault arose, at least partly, out of the nature, conditions, obligations and incidents of the employment.

The Board finds for preliminary hearing purposes that claimant has proven that her injury of January 10, 2002, arose out of and in the course of her employment with respondent, as the assault by Ms. Harris was, at least partly, related to a dispute between claimant and Ms. Harris over their work responsibilities. The Order of the Administrative Law Judge should, therefore, be affirmed.

As is always the case, this finding is not binding in a full hearing on the claim, but is subject to a full presentation of the facts.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Steven J. Howard dated March 8, 2002, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 2002.

BOARD MEMBER

c: Kathleen J. Cossairt, Attorney for Claimant
Mark A. Buck, Attorney for Respondent
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director